

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL BRIAN DASILVA,
Plaintiff,
v.
PADILLA, et al.,
Defendants.

Case No.: 14-cv-2442-WQH-MDD

**REPORT AND
RECOMMENDATION RE:
PARTIAL MOTION TO DISMISS
PLAINTIFF'S SECOND
AMENDED COMPLAINT**

[ECF No. 67]

This Report and Recommendation is submitted to United States District Judge William Q. Hayes pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** Defendants' partial motion to dismiss Plaintiff's Second Amended Complaint be **GRANTED IN PART** and **DENIED IN PART**.

I. PREVIOUSLY DISMISSED CLAIMS

In the Second Amended Complaint ("SAC"), Plaintiff realleges the same claims dismissed previously by the District Judge on this Court's recommendation. (ECF Nos. 49, 57). The District Judge dismissed claim

one in its entirety, parts of claim three, and claims two and four regarding Defendant Gervin only. (ECF No. 57 at 3). The dismissal of claims two and four regarding Defendant Gervin was based upon Plaintiff's failure to allege that Defendant Gervin's conduct did not advance a legitimate correctional goal. (*Id.*).

The SAC adds the allegation that Defendants' conduct did not advance a legitimate correctional goal. (ECF No. 66 at 18 ¶61). The new allegation applies to all Defendants but only has meaning in connection with claims two and four regarding Defendant Gervin. The significance of the new allegation regarding Defendant Gervin will be discussed below.

Regarding the previously dismissed claims realleged in the SAC, except for claims two and four against Defendant Gervin, the Court

RECOMMENDS that these claims be **DISMISSED WITH PREJUDICE**.

II. PROCEDURAL HISTORY

Plaintiff filed the First Amended Complaint ("FAC") on April 28, 2015. (ECF No. 35). On May 12, 2015, Defendants filed a partial motion to dismiss the FAC for failure to state a claim. (ECF No. 37). On October 7, 2015, this Court issued a Report and Recommendation recommending Defendants' partial motion to dismiss the FAC be granted. (ECF No. 49). On February 8, 2016, District Judge William Q. Hayes adopted the Report and Recommendation and granted Defendants' partial motion to dismiss. (ECF No. 57).

In adopting the Report and Recommendation, the district judge dismissed Plaintiff's second and fourth claims against Defendant Gervin because Plaintiff failed to allege the fifth element of a retaliatory grievance claim. (ECF Nos. 49 at 16, 57 at 3). More specifically, Plaintiff failed to

1 allege that Defendant Gervin's conduct did not advance a legitimate
2 correctional goal. (*Id.*).

3 The SAC realleges all claims in the FAC and is identical to the FAC
4 with one difference. (ECF Nos. 35, 66). The difference is Plaintiff addresses
5 his prior defect by adding an additional paragraph stating that Defendants'
6 actions "did not reasonably advance any legitimate correctional goals." (ECF
7 No. 66 at 18 ¶61). The paragraph applies to all Defendants but is designed to
8 address the defect with respect to Defendant Gervin in the second and fourth
9 claims.

10 Defendants raise all of the same challenges in this partial motion to
11 dismiss the SAC that they raised in the partial motion to dismiss the FAC.
12 (ECF Nos. 26, 67). The only new issues are whether Plaintiff sufficiently pled
13 that Defendant Gervin's actions did not reasonably advance any legitimate
14 correctional goals and whether Plaintiff sufficiently alleged facts to
15 demonstrate Plaintiff engaged in protected conduct.

16 **III. STATEMENT OF FACTS**

17 **A. Background Facts**

18 All facts are taken from the SAC and are not to be construed as findings
19 by the Court.

20 On March 12, 2013, while Plaintiff was incarcerated at Centinela State
21 Prison, Defendant Lieutenant Gervin interviewed Plaintiff regarding a Form
22 602 Appeal ("grievance"). (ECF No. 66 at 5 ¶ 1). Plaintiff alleges Gervin was
23 "extremely abrasive, hostile, and derogatory." (*Id.*). Plaintiff claims Gervin
24 belittled him. (*Id.* ¶ 2). Plaintiff said "whatever dude," to which Gervin
25 responded "aren't you a disrespectful little bitch." (*Id.*). A verbal altercation
26 followed and the interview was terminated. (*Id.*).

1 Plaintiff met with Defendant Assistant Warden Calderon after the
 2 incident and reported Gervin's behavior. (*Id.* ¶ 3). Calderon expressed
 3 concern about Gervin's behavior and told Plaintiff he would handle the
 4 matter. (*Id.* ¶ 4). On March 18, 2013, Plaintiff received notice Gervin
 5 cancelled Plaintiff's grievance. (*Id.* ¶ 5). Plaintiff alleges the cancellation
 6 notice states Gervin cancelled his grievance because of Plaintiff's behavior
 7 during the interview. (*Id.*). Plaintiff claims Gervin also filed a false report
 8 against him. (*Id.*). Plaintiff alleges Gervin took these actions "to dissuade
 9 Plaintiff from further using the grievance process." (*Id.* at 13 ¶ 40).

10 Plaintiff spoke with Calderon two more times regarding Gervin's
 11 conduct. (*Id.* at 5-6 ¶ 6). Additionally, Plaintiff filed a Form 22 Request for
 12 Interview ("Form 22") and another grievance. (*Id.*).

13 **IV. LEGAL STANDARD**

14 "A Rule 12(b)(6) motion tests the legal sufficiency of a claim." *Navarro*
 15 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Under Federal Rule of Civil
 16 Procedure 8(a)(2), a pleading must contain a short and plain statement of the
 17 claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556
 18 U.S. 662, 677-78 (2009) (internal quotations omitted). The pleader must
 19 provide the Court with "more than an un-adorned, the-defendant-unlawfully-
 20 harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v.*
 21 *Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of
 22 a cause of action, supported by mere conclusory statements will not suffice."
 23 *Iqbal*, 556 U.S. at 678. "Although for the purposes of a motion to dismiss [a
 24 court] must take all of the factual allegations in the complaint as true, [a
 25 court is] not bound to accept as true a legal conclusion couched as a factual
 26 allegation." *Iqbal*, 556 U.S. at 678 (internal quotations omitted).

On a motion to dismiss for failure to state a claim, a *pro se* pleading is construed liberally. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (citing *Ortez v. Washington Cnty.*, 88 F.3d 804, 807 (9th Cir. 1996)). The *pro se* pleader must still set out facts in his complaint that bring his claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. A court “may not supply essential elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

V. DISCUSSION

A. Claim Two: Right to Petition the Government for Redress of Grievances and Claim Four: Retaliation

In his second and fourth causes of action, Plaintiff alleges Defendant Gervin engaged in retaliatory conduct and interfered with his right to petition for redress of grievances. (ECF No. 66 at 13 ¶ 40, 18 ¶ 59). Plaintiff alleges Gervin filed a false report about Plaintiff and verbally abused him during an interview. (*Id.* at 18 ¶ 59). Plaintiff alleges Gervin’s retaliatory conduct was designed to dissuade Plaintiff from using the grievance process. (*Id.* at 13 ¶ 40).

Defendants challenge Plaintiff’s second and fourth claims only as to the allegations of retaliatory conduct against Defendant Gervin. (ECF No. 67 at 10-15). Defendants do not challenge Plaintiff’s claims against Defendants Calderon, Dominguez, Erece, Greenwood, Miller, Padilla, Rivas and Sais for retaliatory conduct arising from the destruction of his property, prison transfer, withholding mail or interfering with the prison grievance process. (*Id.*).

Defendants argue Plaintiff fails to state a claim against Gervin for retaliation and redress of grievances because Plaintiff failed to sufficiently

1 allege he was engaged in protected conduct giving rise to a retaliation claim
2 and that Gervin did not have a legitimate correctional goal. (*Id.* at 10, 15).

3 **1. Plaintiff Pled Sufficient Facts to Establish Gervin's Actions**
4 **Did Not Reasonably Advance a Legitimate Correctional Goal**

5 Plaintiff sufficiently pled Defendant Gervin's actions did not reasonably
6 advance a legitimate correctional goal by alleging that, after Plaintiff filed a
7 grievance and attempted to appeal it, Gervin made a false report about
8 Plaintiff in retaliation for Plaintiff filing a grievance without reasonably
9 advancing any legitimate correctional goal. (ECF No. 66).

10 A plaintiff must plead five elements to state a claim for retaliation
11 under § 1983:

12 (1) a state actor took an adverse action against him (2)
13 because of (3) the prisoner's protected conduct, and that the
14 action taken against him (4) chilled the prisoner's exercise of
15 his First Amendment Rights and (5) did not reasonably
advance a legitimate correctional goal.

16 *Silva v. Di Vittorio*, 658 F.3d 1090, 1104 (9th Cir. 2011) (quoting *Rhodes*, 408
17 F.3d at 567).

18 There is no dispute that Plaintiff adequately alleges Gervin is a state
19 actor, that Gervin took adverse action against Plaintiff, and that Gervin did
20 so to dissuade Plaintiff from exercising his First Amendment rights. (ECF
21 No. 35 at 5 ¶¶ 1, 5; 13 ¶ 40; 18 ¶ 60). The issue is whether Plaintiff
22 adequately pled that Gervin's actions "did not reasonably advance a
23 legitimate correctional goal."

24 To successfully plead Defendants' actions did not reasonably advance a
25 legitimate correctional goal, the Plaintiff must "allege that the prison
26 authorities' retaliatory action did not advance legitimate goals of the
27 correctional institution or was not tailored narrowly enough to achieve such

goals.” *Rizzo v. Dawson*, 778 F.2d 527, 532 (1985). Basic factual allegations coupled with allegations that a Defendant’s actions were “retaliatory and arbitrary and capricious” are sufficient to allege the retaliatory acts were not a reasonable exercise of prison authority and did not serve any legitimate correctional goal. *Rizzo*, 778 F.2d at 532 n.4 (plaintiff sufficiently pled lack of legitimate correctional goal by alleging a prison official acted in a retaliatory and capricious manner when they recommended the plaintiff be reassigned on the basis of too many library passes). A conclusory allegation that the retaliation is arbitrary, unsupported by any facts, would be insufficient. *See id.* But when the same conclusory allegation is coupled with some factual details the pleading is sufficient. *See id.*

In this case, Plaintiff pled some supporting facts by alleging Gervin filed a false complaint and verbally assaulted Plaintiff to retaliate against Plaintiff for using the grievance process. (ECF No. 66).

Defendants correctly argue that mere verbal abuse by Gervin does not constitute retaliatory action against Plaintiff. (EFC No. 67 at 11-13); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996); *see Ayotte v. Barnhart*, 973 F. Supp. 2d 70, 94 (D. Me. 2013). The Ninth Circuit has held, however, that allegations of prison officials filing a false complaint about a prisoner and making false statements to a disciplinary board, are sufficient to sustain a retaliation claim. *See Watison v. Carter*, 668 F.3d 1108, 1115 (9th Cir. 2012). In *Watison*, the plaintiff sufficiently alleged “the absence of a legitimate penological reason for the alleged adverse actions: Watison pleaded arbitrary, capricious, and retaliatory conduct in pleading that (a) [defendant] filed a *false* disciplinary complaint against him and (b) [defendant] made *false* statements to the parole board, both in retaliation for filing grievances [plaintiff] had filed against [defendant].” *Id.* Here, as in *Watison*, the alleged

1 *false* complaint is sufficient, even though the allegations of verbal abuse
2 would be insufficient on their own. (ECF No. 66 at 13 ¶ 40 and 18 ¶ 59).
3 Plaintiff sufficiently pled the fifth element of a retaliation claim.

4 The Ninth Circuit has also held that a conclusory allegation paired with
5 a chronology showing retaliation is sufficient to state a claim. *See Tomel v.*
6 *Hawaii*, 570 F. App'x 717, 719 (9th Cir. 2014) (citing *Watison*, 668 F.3d at
7 1115) (finding similar chronology of events sufficient). Here, the chronology
8 of the alleged events demonstrates that Plaintiff filed a grievance, and then
9 an official filed a false report against him and verbally harassed him. (ECF
10 No. 66). These allegations are sufficient to plead the causal connection
11 between Plaintiff's grievance and Gervin's conduct to support the allegation
12 that Gervin's conduct lacked a legitimate penological interest. Plaintiff's new
13 allegation, considered in context with his original allegations, satisfies the
14 fifth element because a causal connection was demonstrated and Plaintiff
15 asserted a lack of penological interest.

16 Plaintiff pled sufficient facts to support a retaliation claim as required
17 to sustain the second and fourth claims against Defendant Gervin.

18 **2. Protected Conduct**

19 The Court now turns to whether Plaintiff sufficiently pled facts to
20 establish his conduct was protected.

21 Plaintiff pled sufficient facts to establish he was engaged in protected
22 conduct because prisoners retain the right to file prison grievances and
23 pursue civil rights litigation. *Rhodes v. Robinson*, 380 F.3d 1123, 1130 (9th
24 Cir. 2004) *amended on other grounds by Rhodes v. Robinson*, 408 F.3d 559
25 (9th Cir. 2005) (*reh'g denied*). "In the First Amendment context . . . a
26 prisoner retains those First Amendment rights that are not inconsistent with
27 his status as a prisoner or with the legitimate penological interests of the

1 corrections system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974). “Deliberate
 2 retaliation by state actors against an individual’s exercise of this right is
 3 actionable under section 1983.” *Soranno’s Gasco v. Morgan*, 874 F.2d 1310,
 4 1314 (9th Cir. 1989). Plaintiff alleges that Defendant Gervin deliberately
 5 retaliated against him for exercising his right to file prison grievances. (ECF
 6 66 at 18 ¶ 9).

7 The right to petition the government for redress of grievances is
 8 constitutionally protected conduct. *See Silva v. Di Vittorio*, 658 F.3d 1090,
 9 1101-02 (9th Cir. 2011); *Snyder v. Nolen*, 380 F.3d 279, 290 (7th Cir. 2004).
 10 “Under the First Amendment, a prisoner has both a right to meaningful
 11 access to the courts and a broader right to petition the government for a
 12 redress of his grievances.” *Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir.
 13 2011). The right to petition the government for redress of grievances
 14 includes, but is not limited to, an inmate’s right to be free from retaliation for
 15 filing grievances. *See Gleason v. Villamarin*, No. CV 14-00087-CBM DFM,
 16 2014 WL 658388, at *3 (C.D. Cal. Feb. 18, 2014); *see also Baltoski v.*
 17 *Pretorius*, 291 F. Supp. 2d 807, 811 (N.D. Ind. 2003); *Hines v. Gomez*, 853 F.
 18 Supp. 329, 331 (N.D. Cal. 1994).

19 Because Plaintiff alleges that Defendant Gervin retaliated against him
 20 and interfered with his ability to petition the government for redress of his
 21 grievances, Plaintiff sufficiently pled protected conduct in his second and
 22 fourth claims against Gervin. (ECF 66 at 13 ¶ 40).

23 Accordingly, the Court **RECOMMENDS** Defendant’s motion to dismiss
 24 the second and fourth claims against Gervin be **DENIED**.

25 **VI. CONCLUSION**

26 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the
 27 District Court issue an Order: (1) Approving and Adopting this Report and

1 Recommendation; (2) **DENYING** Defendants' partial motion to dismiss with
 2 respect to Plaintiff's second and fourth claims against Defendant Gervin for
 3 retaliation arising out of the interview; and (3) **GRANTING** Defendant's
 4 partial motion to dismiss for the following re-alleged claims:

5 • Plaintiff's first claim for access to courts as to all Defendants; and
 6 • Plaintiff's third claim for violation of Due Process against
 7 Defendants Calderon, Dominguez, Padilla, Miller, and Sais arising from
 8 destruction of Plaintiff's property, denial of Plaintiff's property claim, and the
 9 transfer of Plaintiff to another prison. This Court further **RECOMMENDS**
 10 that these re-alleged claims be **DISMISSED WITH PREJUDICE**.

11 If the Court's recommendations are adopted, the following claims
 12 remain PENDING:

- 13 • Plaintiff's second claim for denial of the right to petition the
 14 government for redress of grievances against Defendants
 15 Calderon, Dominguez, Gervin, Greenwood, Miller, Padilla, Rivas and
 16 Sais arising from interference with the prison grievance process;
 17 • Plaintiff's third claim for violation of Due Process against
 18 Defendants Erece, Greenwood, John Doe, Padilla, Rivas, Ruiz, and Sais
 19 arising from failing to notify superiors of Plaintiff's grievances, refusing
 20 Plaintiff law library access, and the withholding of Plaintiff's legal mail;
 21 • Plaintiff's fourth claim for retaliation against Defendants Calderon,
 22 Dominguez, Erece, Gervin, Greenwood, John Doe, Miller, Padilla, Rivas,
 23 and Sais arising from the deprivation of Plaintiff's property, transfer to
 24 Tehachapi State Prison, withholding Plaintiff's legal mail, and filing
 25 false allegations and reports against Plaintiff; and
 26 • Plaintiff's fifth claim alleging related state law claims.
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1 **IT IS HEREBY ORDERED** that any written objections to this Report
2 must be filed with the Court and served on all parties no later than **July 20,**
3 **2016.** The document should be captioned “Objections to Report and
4 Recommendation.”

5 **IT IS FURTHER ORDERED** that any reply to the objection shall be
6 filed with the Court and served on all parties no later than **July 27, 2016.**
7 The parties are advised that the failure to file objections within the specified
8 time may waive the right to raise those objections on appeal of the Court’s
9 order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998).

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11 **IT IS SO ORDERED.**

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13 Dated: July 6, 2016

14 
15 Hon. Mitchell D. Dembin
16 United States Magistrate Judge
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